



In re application of Gerardo Melendrez )

Serial No.: 10/808, 112 )

Filed: 03/24/2004 )

For: Body Drier )

Date: January 27, 2006

Group Art Unit: 3743

Examiner: Nguyen, Camtu Tran

Hon. Commissioner of Patents and Trademarks  
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Mail Stop: Appeal Briefs-Patents

## **APPLICANT'S APPEAL BRIEF**

### **I.**

#### **Real Party In Interest**

The real party in interest is Gerardo Melendrez, applicant herein.

### **II.**

#### **Related Appeals and Interferences**

None.

### **III.**

#### **Status of Claims**

Claims 1-26 have been canceled. Claims 27-32 are pending and are being appealed herein.

### **IV.**

#### **Status of Amendments**

No amendments were filed subsequent to the final rejection.

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## V.

### Summary of the Claimed Invention

The present invention as defined in independent claim 32 relates to a body drier comprising a housing 1 having a front wall 4, a rear wall 5 and a pair of side walls 6 (p.3, lines 18-19), a plurality of vents 10 positioned on the front wall of said housing; a hot air blower assembly received within said housing for dispersing hot air through said vents, said hot blower assembly including a fan 7 having an air output with a plurality of heaters 9 positioned adjacent thereto (p.4, lines 1-9); a switch means 19 positioned on said housing; a microprocessor means 35 in communication with said switch means for sequentially activating a select one of said heaters each time said switch means is actuated. (p 5, lines 7-15).

Dependent claim 28 further defines the body dryer as having a gravity actuated safety switch 21 electrically connected to said hot air blower assembly for disabling power thereto in the event said housing is overturned (p.5, lines 15-17) while claim 29 adds the limitation that the housing is pivotally mounted on a weighted support stand 22 that uprightly supports said housing on an underlying surface. (p. 5, lines 18-19).

Dependent claim 30 further defines the housing front wall as being convex so that said vents simultaneously project hot air upwardly, downwardly, and straight ahead (p. 4, lines 8-11); claim 31 adds that each of said vents includes a plurality of pivotal louvers 11 operably connected to an adjustment dial 12, said adjustment dial positioned on the front wall of said housing whereby said dial is rotated to pivot said louvers so as to redirect hot air (p.4, lines 12-19). Finally, claim 32 provides that the weighted support stand includes a planar base portion 23 with a pair of spaced arms 24 extending upwardly therefrom, each of said arms terminating at a distal end and an adjustment knob 25 releasably securing the distal end of each of said arms to one of said housing sidewalls allowing said housing to be angularly adjusted. (p. 6, lines 1-6).

## **VI.**

### **Grounds of Rejection to be Reviewed on Appeal**

Whether claims 27 and 31 are patentable under 35 U.S.C. 103 over U.S. pat. no. 5, 377, 424 issued to Albanes, in view of U.S. pat no. 5, 825, 974 to Hutton; whether claim 28 is patentable over Albanes, supra, in view of U.S. pat. no. 5, 361,321 to Marino; whether claims 29 and 32 are patentable in view of Albanes in view of U.S. pat. No. 2, 563, 449 to Aufiero and whether claim 30 is patentable over Albanes in view of U.S. pat. no. 5,239, 610 to Shao.

## **VII.**

### **Argument**

In a final office action issued April 20, 2005, the examiner rejected pending claims 27-32 under 35 U.S.C. 103 in light of the references cited above. To establish a prima facie case of obviousness, the examiner must establish, inter alia, that the references teach or suggest all claim limitations. M.P.E.P. § 2143.03. In applying 35 U.S.C. 103, the following factors should be considered:

- A) The claimed invention must be considered as a whole;
- B) The references must be considered as a whole and must suggest the *desirability* and thus the obviousness of making the combination;
- C) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention, and;
- D) Reasonable expectation of success is the standard with which obviousness is determined. M.P.E.P § 2141, citing *Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 (Fed. Cir. 1986).

A statement that modifications of the prior art were well within the ordinary skill of the art because the references cited teach that all of the features are individually known does not establish a prima facie case of obviousness without some objective reason to combine the

teachings of the references. M.P.E.P. § 2143.01, citing *Ex Parte Levengood*, 28 U.S.P.Q. 2d 1300 (B.P.A.I. 1993).

As more fully explained below, the examiner has viewed the cited references with the benefit of impermissible hindsight, has unjustifiably taken official notice with respect to some features and has provided no basis or desirability for making proposed modifications to the prior art. Furthermore, in rejecting the pending claims, the examiner focused on individual features of the claimed invention as they relate to the references individually as opposed to focusing on the claimed invention or the references as a whole. Additionally, the examiner rejected dependent claims based on combinations of references without considering other references that were cited in rejecting intervening claims; as such, the examiner failed to show how the cited references and the omitted references could be combined to form the claimed invention.

**A. The Cited References Do Not Disclose or Suggest, Either Individually, or in Combination, a Switch Means in Combination with a Microprocessor for Sequentially Activating One of a Plurality of Heaters Each Time the Switch is Actuated according to the Present Invention.**

Claim 27, the entire text of which is provided in the appendix, *infra*, includes:

“a housing having a front wall, a rear wall and a pair of side walls;

a plurality of vents positioned on the front wall of said housing;

a hot air blower assembly received within said housing for dispersing hot air through said vents, said hot blower assembly including a fan having an air output with a plurality of heaters positioned adjacent thereto;

*a switch means positioned on said housing;*

*a microprocessor means in communication with said switch means for sequentially activating a select one of said heaters each time said switch means is actuated.”* (Emphasis added).

Regarding the switch means, the examiner cited the patent to Albanes in combination with that of Hutton. Albanes discloses a body drier including a housing with adjustable vents thereon. Hutton discloses an electric fan heater including a two-position switch, that when placed in a first position, connects a fan motor and heating element in parallel, and when placed in a second position, connects the two components in series. The device allows a user to select a quieter mode of operation, if desired. The examiner stated that, “..it would have been obvious to one skilled in the art to apply the sophisticated switch taught by Hutton et al. in the Albanes drying system as such would offer sequentially activating a select one of pluralities of heaters each time switch means is activated.” Conversely, the device in no way discloses or suggests such a switch means, but instead relates to a switch that places a fan motor and a heating element in either parallel or series. By placing the two elements in series, a voltage reduction through each is realized, thereby reducing their operating intensity. The switch of Hutton does not remotely disclose or suggest a switch that, when actuated, sequentially activates another of a plurality of heating elements to vary the heat intensity of a body drier.

Claim 27 also includes a microprocessor that is essential for the sequential switch to operate as claimed. The patent to Hutton includes no such microprocessor, which is not surprising considering that the device does not relate to sequentially activating heating elements. Regarding such feature, the examiner noted that “[w]ith regards to the microprocessor, which would electrically (connect) to the heater control switch, this piece of electrical circuit is well known in the art for controlling the operation of the heaters. Therefore, it would have been obvious to one skilled in the art to utilize it in conjunction with the Hutton et al’s switch as such would provide a longer life of the device as well as efficiency of its operation.” However, the examiner cited no references in support of such conclusion. In response to the second, non-final office action, Applicant requested that according to M.P.E.P. § 2144.03, a reference be cited in support of such assertion. Instead of citing such a reference in the final office action, the

examiner reiterated the position as stated above.

MPEP §2144.03 provides that, “Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge *in the art* are capable of instant and unquestionable demonstration as being well-known. (Emphasis added). As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be ‘capable of such instant and unquestionable demonstration as to defy dispute’ (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)). It is never appropriate to rely solely on ‘common knowledge’ in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697 (‘[T]he Board cannot simply reach conclusions based on its own understanding or experience or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings.’).” In this case, the examiner has failed to show how microprocessors are used with body drier switches to sequentially activate multiple heaters to vary the output therefrom. Such claimed feature is neither disclosed nor suggested in the references of record herein.

**B. None of the References Cited Herein Disclose or Suggest Employing a Gravity-Actuated Switch for Disabling a Hot Air Bower Assembly if the Housing is Overturned**

Regarding claim 28 pertaining to the gravity-actuated switch, the examiner cited the patent to Albanes in view of Marino. In the comments accompanying the final office action, the examiner stated: “With regard to applicant’s comments pertaining to the Marino reference, applicant’s attention is directed to applicant’s specification on page 5 lines 15-17 where these lines (disclose) a ‘gravity switch for disabling electrical power to the heater and blower in the event that the housing is inadvertently overturned.’ The Marino (patent) discloses a safety shutoff switch in the event that the heater unit tips forward. It is inescapable that the Marino reference

discloses the **same** switch for the **same purposes**.” (Emphasis added).

Such hindsight and revisionary analysis is perhaps why we are before the Board today. The Abstract in Marino provides, “[i]ncluded with the switch is a manually operable actuator **projecting from the front wall and movable in a single motion** between a stable first position producing the closed condition and a stable second position producing the open condition, and wherein the actuator is shaped and arranged to be moved into the second position **in response to contact with a substantially planar surface**.” (Emphasis added). Clearly from the disclosure of Marino, in order for the switch to disable the heater, the heater housing must fall forwardly **and** the front face thereof must engage a planar support surface. See column 2, lines 67-68, and column 3, lines 1-12. The purpose of the switch in Marino is not to disable the heater if the housing topples, but to disable it if the housing falls on its front face, which could result in overheating by obstructing the hot air outlet. Column 1, lines 49-50. Conversely, the present claimed invention includes a **gravity-actuated** switch that disables a hot air blower assembly upon the housing toppling in any direction and regardless of whether the housing engages a planar or other surface. Such safety feature is critical with an electrical device that will be operated near water. Marino neither discloses such feature nor suggests a motivation for doing so. Clearly, the reference neither discloses the “same switch” nor one that is for “the same purposes” as the examiner maintains. Additionally, the examiner failed to show a motivation for combining a manual switch of Marino with a parallel/series switching circuit of Hutton to create a drier with the gravity-actuated switch and a microprocessor controlled switch to sequentially enable multiple heaters according to the present invention.

Claim 29, which is dependent upon claim 28, and is directed to the housing being mounted on a *weighted* base was rejected in light of Albanes in view of Aufiero. Aufiero merely discloses a heater mounted on a “base.” It does not refer to a body drier as claimed mounted on a weighted base. More importantly, claim 29 depends from claim 28, which was rejected in light

of Albanes in view of Marino. The examiner should have attempted to show how it is obvious to combine the base of Aufiero, with Albanes, the switch of Marino **and** the circuitry of Hutton to produce the claimed invention. Such attempt was not made. Claim 32 further defined the support stand as including a planar base portion with a pair of spaced arms extending upwardly therefrom, each of said arms terminating at a distal end and an adjustment knob releasably securing the distal end of each of said arms to one of said housing sidewalls allowing said housing to be angularly adjusted. The examiner merely stated that “it would have been obvious to one skilled in art to mount the Albanes (device), as modified, on Aufiero’s base portion for the purposes of allowing the housing to be angularly adjusted and also to provide stability.” Again, the examiner merely cites a reference that contains the claimed element without stating objective reasoning to combine the references.

Claim 30 which depends from claim 29, defines the front wall as being convex so that said vents simultaneously project hot air upwardly, downwardly and straight ahead. The claim was rejected in light of Albanes in view of Shao. Shao discloses a compact heater that is plugged into a wall outlet having a slightly convex front face. The device in no way relates to hot air blowers or body driers according to the present invention. However, the examiner failed to show or even imply as to how combining such feature with those discussed, supra, to form the present invention was disclosed or suggested. The examiner merely stated that because Shao disclosed a heater with a convex front face, it would have been obvious to combine it with those references cited above to form a body drier having the gravity actuated switch means, the weighted base and the microprocessor.

Claim 31 directed toward the pivotal louvers was rejected in light of Albanes and Hutton. The examiner indicated that Albanes disclosed the housing, a blower and pivotal louvers while Hutton disclosed the switch means as discussed, supra. However, claim 31 depends from claim 30, which depends from 29, etc. Accordingly, claim 31 contains pivotal louvers, the convex



front wall, the weighted base and the gravity actuated switch. Not only does Hutton fail to show the gravity switch as discussed above, neither Albanes nor Hutton discloses a convex front wall or a weighted base. In order for claims 31 and 32 to be obvious, the examiner would have to show the suggestion of combining Albanes, Hutton, Shao, Marino **and** Aufiero, not just any two of the five. The record is silent as to the motivation for combining the numerous references.

### **C. Conclusion**

In conclusion, none of the references cited herein, either individually or in combination, disclose or suggest a body drier according to the present invention. Applicant's invention, as claimed, includes a housing having a convex front wall with a plurality of louvered vents thereon allowing hot air to be simultaneously distributed upwardly, downwardly and straight ahead. Furthermore, any one of a plurality of heaters can be sequentially activated with a uniquely designed switch means to vary the heating intensity if desired. Not only does the prior art not disclose or suggest such a combination, the examiner has cited combinations of references that do not contain all of the limitations of the claims, much less suggest their combination. For the foregoing reasons, applicant respectfully avers that claims 27-32 are allowable.

## VIII.

### Claims Appendix

27. (new) A body dryer comprising:

a housing having a front wall, a rear wall and a pair of side walls;

a plurality of vents positioned on the front wall of said housing;

a hot air blower assembly received within said housing for dispersing hot air through said vents, said hot blower assembly including a fan having an air output with a plurality of heaters positioned adjacent thereto;

a switch means positioned on said housing;

a microprocessor means in communication with said switch means for sequentially activating a select one of said heaters each time said switch means is actuated.

28. (new). The body dryer according to Claim 27 further comprising a gravity actuated safety switch electrically connected to said hot air blower assembly for disabling power thereto in the event said housing is overturned.

29. (new) The body dryer according to Claim 28 wherein said housing is pivotally mounted on a weighted support stand that uprightly supports said housing on an underlying surface.

30. The body dryer according to Claim 29 wherein said housing front wall is convex so that said vents simultaneously project hot air upwardly, downwardly, and straight ahead.

31. (new). The body dryer according to Claim 30 wherein each of said vents includes a plurality of pivotal louvers operably connected to an adjustment dial, said adjustment dial positioned on the front wall of said housing whereby said dial is rotated to pivot said louvers so as to redirect hot air.

32. (new). The body dryer according to claim 31 wherein said support stand includes a planar base portion with a pair of spaced arms extending upwardly therefrom, each of said arms


terminating at a distal end;

an adjustment knob releasably securing the distal end of each of said arms to one of said housing sidewalls allowing said housing to be angularly adjusted.

IX.  
Evidence Appendix

N/A.

Respectfully submitted,

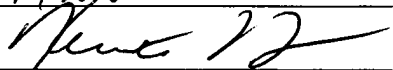
  
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